(3)

No. 90-409

Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

BOSTON RANCH COMPANY, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioners do not have contractual rights to continue to receive water from a federal reclamation project at a fixed rate to irrigate their excess lands.

2. If petitioners do have contractual rights to receive the water at a fixed rate, whether Section 224(h) of the Reclamation Reform Act of 1982, which has the effect of prospectively increasing the price that petitioners must pay to receive the water, abrogates petitioners' contractual rights in violation of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	15
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	16
Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986)	16, 17, 19, 21
Charles River Bridge v. *Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837)	14, 16
Citibank, N.A. v. *Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990)	18
Ivanhoe Irrigation Dist. v. *McCracken*, 357 U.S. 275 (1958)	17, 20
Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987)	21
National Land for People v. *Kleppe*, 417 F. Supp. 449 (D.D.C. 1976)	8, 10
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987)	21
Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978)	21
Pension Benefit Guaranty Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984)	18
Ruckleshaus v. *Monsanto Co.*, 467 U.S. 986 (1984)	22
The Sinking-Fund Cases, 99 U.S. 700 (1878)	21
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)	19
Westlands Water Dist.—Legal Questions, 85 Interior Dec. 297 (1978)	11
Wickard v. *Filburn*, 317 U.S. 111 (1942)	20

Constitution, statutes and regulations: Page

U.S. Const.:
Art. 1, § 10, Cl. 1 (Contract Clause) 18
Amend. V 14, 18
Due Process Clause 19
Just Compensation Clause 21, 22
Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156 5
§ 1(a), 74 Stat. 156 5
Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185 11
§ 122, 99 Stat. 1320 11
Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636 4
§ 46, 43 U.S.C. 423e 4, 6
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 12
§ 5302, 101 Stat. 1330-268 to 1330-269 12
Reclamation Act of 1902, ch. 1093, 32 Stat. 388
§ 1, 43 U.S.C. 391 2
§ 2, 43 U.S.C. 411 2
§ 4, 43 U.S.C. 461 3
§ 5, 43 U.S.C. 431 3
§ 6, 43 U.S.C. 491 (32 Stat. 389) 3
§ 10, 43 U.S.C. 373 3
Reclamation Extension Act of 1914, ch. 247, 38 Stat. 686 3
§ 5, 43 U.S.C. 492 3
Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, 43 U.S.C. 485 *et seq.* 5
§ 9(e), 43 U.S.C. 485h(e) 5
Reclamation Reform Act of 1982, Tit. II, 43 U.S.C. 390aa *et seq.* 8
§ 203, 43 U.S.C. 390cc 9
§ 203(a), 43 U.S.C. 390cc(a) 9
§ 203(b), 43 U.S.C. 390cc(b) 9-10, 22
§ 204, 43 U.S.C. 390dd 20
§ 205(b), 43 U.S.C. 390ee(b) 20

Statutes and regulations—Continued: Page

§ 205(c), 43 U.S.C. 390ee(c) 9, 10, 12
§ 208(b), 43 U.S.C. 390hh(b) 20
§ 209, 43 U.S.C. 390ii 8
§§ 209-230, 43 U.S.C. 390ii-390zz-1 10
§ 209(a), 43 U.S.C. 390ii(a) 8
§ 209(e), 43 U.S.C. 390ii(e) 8-9, 10
§ 224(h), 43 U.S.C. 390ww(h) 12, 13, 14, 18, 19, 20, 21, 22

43 C.F.R.:

Section 426.11(i)(1) (1984) 10
Section 426.11(i)(4) 10, 13
Section 426.11(i)(4)(ii) 13

Miscellaneous:

35 Cong. Rec. (1902):

p. 1383 2
p. 6734 2

48 Fed. Reg. 54,781 (1983) 10

53 Fed. Reg. (1988):

p. 21,857 13
p. 21,860 13
p. 50,530 13
p. 50,534 13

H.R. Rep. No. 399, 86th Cong., 1st Sess. (1960) 5
H.R. Rep. No. 458, 97th Cong., 2d Sess. (1982) 3
S. Rep. No. 373, 97th Cong., 2d Sess. (1982) 8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-409

BOSTON RANCH COMPANY, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is reported at 899 F.2d 814. The memorandum decision of the district court (Pet. App. C1-C12) is not reported.

JURISDICTION

The decision of the court of appeals was entered on March 16, 1990, and amended on June 7, 1990. A petition for rehearing was denied on June 7, 1990 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners receive irrigation water from a federal reclamation project pursuant to certain water service contracts. They contend that the contracts and a subsequent stipulated judgment give them the right to continue to receive irrigation water at a highly subsidized price for their "excess lands" and that Congress has unlawfully abrogated that right. The court of appeals rejected petitioners' interpretation of the contracts and the judgment and held, alternatively, that even if petitioners had such rights, Congress did not act unlawfully in requiring that petitioners pay "full cost" for receipt of the water.

1. The Reclamation Act of 1902, ch. 1093, 32 Stat. 388, created a federal program to encourage settlement of the West through the provision of irrigation water for arid lands. Congress specifically wished to encourage the establishment of modest sized family farms owned and operated by families that resided upon them. See, *e.g.*, 35 Cong. Rec. 1383, 6734 (1902). To achieve that goal, Congress limited the potential beneficiaries of the program and the size of the subsidiary that they could receive.

Section 1 of the Act created a reclamation fund to be used "in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in the western states. 43 U.S.C. 391. Section 2 authorized the Secretary of the Interior to carry out the activities described in Section 1. 43 U.S.C. 411. Section 4 empowered the Secretary, among other things, to determine the charges to be paid by the water users, such charges to be fixed "with a view of returning to the

reclamation fund the estimated cost of construction of the project." 43 U.S.C. 461. The Act, however, did not provide for the return of interest on the government's construction costs.

Section 5 of the Act directly implemented Congress's intent to promote family farms, to spread widely the benefits of the reclamation program, and to prevent speculation. See H.R. Rep. No. 458, 97th Cong., 2d Sess. 8 (1982). That provision states in relevant part:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

43 U.S.C. 431. Section 10 of the Act authorized the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." 43 U.S.C. 373.

Congress subsequently modified the reclamation program created by the 1902 Act through the Reclamation Extension Act of 1914, ch. 247, 38 Stat. 686. Section 5 of that statute provided that, in addition to the construction charge, project participants would also be required to pay an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or particular project

units. 43 U.S.C. 492.[1] Thereafter, Congress enacted the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636. Section 46 of the 1926 Act generally provided that no water shall be delivered from any new federal reclamation project unless the Secretary of the Interior has entered into a contract with an irrigation district or districts organized under state law, which contract shall provide for payment by the district or districts of the cost of constructing, operating, and maintaining the project works. 43 U.S.C. 423e.[2] Section 46 further stated that such contracts shall provide:

> that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior * * *.

43 U.S.C. 423e.

---

[1] Under Section 6 of the 1902 Act, operation and maintenance costs had been paid from the Reclamation Fund until such time as the construction charges for the major portion of the lands within the project were paid. See 32 Stat. 389.

[2] Prior to 1926, the Secretary of the Interior had entered into contracts directly with the individual water users.

Congress revisited the reclamation program in the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, 43 U.S.C. 485 *et seq.* Section 9(e) of the 1939 Act authorizes the Secretary to enter into either long- or short-term contracts to furnish water for irrigation purposes. 43 U.S.C. 485h(e). Such water service contracts shall be for periods not to exceed 40 years and "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. 485h(e).

2. In 1960, Congress authorized the San Luis Unit of the Central Valley Project "for the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California * * *." Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156. Section 1(a) of the 1960 Act stated, in part, that "[i]n constructing, operating, and maintaining the San Luis unit, the Secretary shall be governed by the Federal reclamation laws." *Ibid.* As the House Report explains, Congress expected that the acreage limitations of the federal reclamation laws would "cause the large holdings to be broken up into family-size operations." H.R. Rep. No. 399, 86th Cong., 1st Sess. 2-3 (1960).

In 1963, the United States and the Westlands Water District entered into a 40-year water service contract pursuant to the federal reclamation laws that provided, among other matters, for the delivery of irrigation water from the San Luis Unit to the District at a rate of $7.50 per acre-foot plus a $0.50 per acre-foot drain service charge. Pet. App. K8. Articles 23-25 of the 1963 contract specifically addressed "ex-

cess lands" in accordance with Section 46 of the Omnibus Adjustment Act of May 25, 1926, 43 U.S.C. 423e (p. 4, *supra*). Pet. App. K11-K16.

Article 23(a) provided, *inter alia*, that no water made available under the 1963 contract shall be furnished to any excess lands unless the owners have executed valid recordable contracts agreeing to the provisions of Articles 23-25 of the contract. Pet. App. K11. Article 23 required the landowner to sell his excess lands at an appraised price that excluded value attributable to the construction of the reclamation project. Pet. App. K11-K12. Article 25(b) provided that each large landowner "as a further condition precedent to the right to receive water made available, pursuant to this contract for any of his excess land" shall execute a valid recordable contract with the United States agreeing to dispose of his excess lands "to persons who can take title thereto as non-excess land" within 10 years (*id.* at K14) and further agreeing that if the landowner fails to dispose of the excess land within 10 years, the Secretary may sell the lands (*ibid.*). Compare 43 U.S.C. 423e.

Thereafter, the United States and petitioners, who are large landowners holding excess lands within the Westlands Water District, executed recordable contracts pursuant to the federal reclamation laws and the 1963 contract.[3] All of these contracts are similar

---

[3] In 1972, petitioner Boston Ranch Company executed two recordable contracts covering a total of 23,711 acres of excess lands. Pet. App. A4 n.2. Petitioner West Haven Farming Co. executed five recordable contracts covering a total of 5,566 acres of excess land in 1973 and 1974. *Ibid.* Petitioner Edwin R. O'Neill executed three recordable contracts covering a total of 974 acres of excess land in 1969 and 1970. *Ibid.*

in form. The introductory paragraphs of the recordable contracts state that they are being made pursuant to the federal reclamation laws. Pet. App. L2. Those paragraphs also refer to the 1963 contract between the United States and the Westlands Water District ("District Contract"), including, specifically, Articles 23, 24, and 25 of the District Contract, and recite that the recordable contracts are being made in consideration of, among other things, "the direct and indirect benefits to be derived under the terms of the District Contract." *Id.* at L2-L3.[4]

3. In 1976, the United States District Court for the District of Columbia directed the Secretary of the Interior to initiate formal rulemaking concerning the approval of excess land sales and it entered an injunction barring the Bureau of Reclamation, Department of the Interior, from approving excess land sales in the Westlands Water District pending the

---

[4] Like the District Contract, the recordable contracts provide for the appraisal of the excess lands in a manner whereby "no value shall be given such land on account of the existing or prospective availability of water or service from the Central Valley Project" and state that the landowner agrees that he shall not sell his excess lands at prices exceeding such appraised values. Pet. App. L5-L6. The landowner also confers on the Secretary the authority "to sell and transfer at any time following the expiration of a period of ten (10) years immediately following the date of execution of this agreement, all of its then right, title, and interest in and to any or all of the excess land." *Id.* at L7. Finally, the recordable contracts also provide that the computation of the 10-year period "shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner." *Id.* at L8.

completion of the rulemaking.[5] *National Land for People* v. *Kleppe*, 417 F. Supp. 449 (D.D.C. 1976). The Secretary subsequently published proposed regulations concerning excess land sales. Those regulations, however, never became finalized. Instead, Congress enacted new legislation revising the reclamation program.

The Reclamation Reform Act of 1982 (RRA), Tit. II, 43 U.S.C. 390aa *et seq.*, was enacted to provide, among other things, "a modern policy expression regarding Federal reclamation law in order to resolve the many controversies which would otherwise result from the implementation of regulations based upon current law." S. Rep. No. 373, 97th Cong., 2d Sess. 11 (1982). The 1982 legislation comprehensively revised the federal reclamation laws. Several of these revisions are pertinent here.

First, Section 209 addresses the disposition of excess lands. See 43 U.S.C. 390ii. Section 209(a) provides, in substance, that no irrigation water from federal reclamation projects shall be delivered for use in the irrigation of lands held in excess of the ownership limitations imposed by federal reclamation law unless and until the landowners thereof shall have executed a recordable contract requiring the disposal of such excess lands within a reasonable time, which period is defined to be not more than ten years from the date of execution of the contract in the case of recordable contracts entered into prior to the enactment of the RRA. 43 U.S.C. 390ii(a). Section 209(e)

---

[5] Although the federal reclamation laws had authorized the Secretary to issue rules and regulations in furtherance of their purposes, the Secretary had never implemented that authority through formal rulemaking regarding the approval of excess land sales.

provides, however, that where an owner of excess lands has previously entered into a recordable contract and the Secretary has withheld the processing or approval of the disposition of such excess lands, the date for disposing of such lands shall be extended by a period equal to the amount of time the Secretary withheld such processing. 43 U.S.C. 390ii(e). See Pet. App. G1.

Second, Section 205(c) states that notwithstanding any extension of time as provided in Section 209(e), excess lands covered by recordable contracts executed prior to the enactment of the RRA shall be eligible to receive irrigation water at less than "full cost" for a period not to exceed ten years from the date of execution of the contracts. 43 U.S.C. 390ee(c).[6] The right to receive water at less than full cost, however, would not terminate sooner than 18 months after the date on which the Secretary recommended processing or approval of excess land sales. 43 U.S.C. 390ee(c). See Pet. App. G2.

Finally, Section 203 addresses the applicability of the various RRA provisions to new, amended, or existing contracts. See 43 U.S.C. 390cc. Section 203 (a) provides that all of the provisions of the RRA shall be applicable to any district that enters into a new contract with the Secretary, or that thereafter amends an existing contract so as to receive supplemental or additional benefits, or that amends an existing contract for the purposes of conforming to the RRA. 43 U.S.C. 390cc(a). In addition, Section

---

[6] The term "full cost" as used in the RRA indicates a rate of return to the government that takes into account interest upon the government's project construction costs as well as recovery of construction costs and operation and maintenance costs.

203(b) expressly makes Sections 209 through 230 of the RRA applicable to all existing contracts. 43 U.S.C. 390cc(b). See Pet. App. G1.

4. Following passage of the RRA, the Secretary commenced rulemaking proceedings to adopt regulations pursuant to the new statute. The question arose whether Section 205(c), which requires water recipients to pay "full cost" for water supplied to excess lands, applies to extended pre-existing contracts. See Pet. App. A9-A10. The regulations that the Secretary ultimately issued stated in relevant part (Pet. App. H1):

> Land under recordable contract which is held by a water user not subject to the discretionary provisions of [the RRA] may continue to receive irrigation water at the contract water rate for the extended term of the contract. * * *

43 C.F.R. 426.11(i)(4) (1984) (Pet. App. H1). See 48 Fed. Reg. 54,781 (1983). That regulation had the effect of rendering the "full cost" pricing provisions of Section 205(c) of the RRA inapplicable to petitioners' excess lands.

The Secretary recommenced processing of excess land sales in the Westlands Water District on July 10, 1984, approximately eight years after entry of the injunction in *National Land for People* v. *Kleppe*, *supra*. See 43 C.F.R. 426.11(i)(1). Shortly thereafter, the Secretary implemented Section 209(e) by executing amendatory recordable contracts with petitioners Boston Ranch and West Haven that extended the maturity date in Paragraph 11 of those petitioners' recordable contracts by approximately eight years. Pet. App. A10, n.7.

5. As discussed above (p. 5, *supra*), the United States and the Westlands Water District entered into

a long-term water service contract in 1963. However, for various reasons, no water was supplied pursuant to that contract for many years. Rather, water was continuously delivered to Westlands pursuant to a series of short-term contracts. In 1978, the Solicitor of the Department of the Interior issued an opinion that cast doubt whether the United States was under a binding obligation (or was authorized) to deliver water for all of Westlands. *Westlands Water District—Legal Questions*, 85 Interior Dec. 297. See Pet. App. A7-A8.

In 1979, various landowners in Westlands, including petitioners Boston Ranch and O'Neill, filed an action in state court against the District and asserted certain priorities over other water users. The case was removed to federal court and the United States was subsequently joined as a party. *Barcellos and Wolfsen, Inc.* v. *Westlands Water Dist.*, No. CV 79-106-EDP (E.D. Cal.). Thereafter, Westlands filed a separate, but related, action against the United States. *Westlands Water Dist.* v. *United States*, No. CV F-81-245-EDP (E.D. Cal.). The federal district court consolidated the cases. Pet. App. A7.

The parties negotiated a settlement and agreed upon the terms and conditions of a judgment. Pet. App. A10-A11. The proposed settlement was submitted to Congress for review pursuant to Section 122 of the Act of Dec. 19, 1985 (Further Continuing Appropriations Act for FY 1986), Pub. L. No. 99-190, 99 Stat. 1185, 1320, which barred Interior from expending funds on the submission of the settlement to the District Court "until the Congress has received from the Secretary and reviewed for a period of 30 days a copy of the proposed settlement agreement which has been approved and signed by the Secretary." When Congress took no further legislative ac-

tion, the settlement was submitted to the district court, which entered the agreed-upon judgment on December 30, 1986. Pet. App. A11, N1-N18. The judgment states, in pertinent part, that the United States shall refund certain contract overpayments and that the United States and the District shall perform the 1963 Contract, subject to certain provisos not relevant here. Pet. App. N2-N3. The judgment does not discuss the question of the price of water for excess lands under extended terms contracts. Pet. App. A11-A12, A25.

6. On December 22, 1987, the President signed the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. Section 5302 of that statute, entitled "Reclamation Reform Act Amendments" (101 Stat. 1330-268 to 1330-269), amended the RRA by, among other things, adding Section 224 (h), which states as follows:

> The provisions of section 205(c) are and have been applicable to all recordable contracts executed prior to October 12, 1982, and any decision, rule, or regulation promulgated by the Department of the Interior to the contrary is hereby revoked: *Provided*, That notwithstanding the provisions of subsection (i), the Secretary shall not seek reimbursement for any amounts due under this subsection or section 205(c) which was due prior to the date of enactment of this subsection.

43 U.S.C. 390ww(h). Section 224(h) had the effect of invalidating the Secretary's regulation (p. 12, *supra*) interpreting Section 205(c)'s "full cost" pricing provisions as inapplicable to petitioners' excess lands.

On June 10, 1988, Interior published in the Federal Register proposed rules concerning the 1987 amend-

ments to the RRA, 53 Fed. Reg. 21,857, 21,860. Final rules and regulations were published on December 16, 1988, 53 Fed. Reg. 50,530, 50,534. As revised in light of the 1987 Amendments, 43 C.F.R. 426.11(i)(4) now provides that land under recordable contract may continue to receive irrigation water deliveries at the non-full-cost rate for the original disposition period of the recordable contract but further states in Subsection (ii):

> For land under extended recordable contract owned by prior law recipients, water deliveries shall be made at the full-cost rate described in § 426.7(f)(1) commencing December 23, 1987, through the effective termination date of the extended recordable contract.

Hence, beginning on December 23, 1987, petitioners have been required to pay for federal project water at a full cost rate for federal reclamation project irrigation water delivered for use on their excess lands subject to the extended recordable contracts.

7. In 1988, petitioners filed a motion to enforce the 1986 judgment against the Department of the Interior and Interior officials. The motion alleged, in substance, that petitioners were entitled to receive federal reclamation water for use on their excess lands at the rate of $8 per acre-foot, notwithstanding Section 224(h) of the RRA. The district court denied the motion to enforce the judgment. Pet. App. C1-C17.

The court of appeals affirmed. Pet. App. A1-A41. The court first rejected petitioners' contention that Section 224(h) does not apply to water delivered for use on petitioners' excess lands. Pet. App. A13-A15. It next adressed petitioners' assertion that Section

224(h) violated their Fifth Amendment rights to due process and just compensation by depriving them of their contractual rights to receive federal project water at a less than full-cost rate. Pet. App. A15-A25. The court explained that petitioners must initially "demonstrate that they *had* such a contractual right before the enactment of § 224(h)." *Id.* at A16. The court concluded that petitioners lacked such rights. *Id.* at A17-A25.

The court explained that nothing in the District Contract or petitioners' individual recordable contracts addresses what price should be charged for water delivery to excess lands when—as here—the 10-year deadline for selling such land expires. Pet. App. A17-A23. In the face of the contract's silence, the court concluded that "[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public." *Id.* at A23 (quoting *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837)). The court accordingly held that petitioners "never had a contractual right to receive more than ten years of water for their excess lands" and that "Congress, in enacting § 224(h), did not deprive them of a property right within the meaning of the fifth amendment." Pet. App. A25.

The court also rejected petitioners' contention that Section 224(h) violated the principle of separation of powers by modifying the 1986 stipulated judgment concerning the District contract. Noting that the 56-page judgment nowhere discusses the issue of the price of water to be used to irigate excess lands under extended recordable contracts, the court found that Section 224(h) was not inconsistent with the judgment. Pet. App. A25. Judge Fernandez dissented. *Id.* at A26-A41.

Petitioners filed a petition for rehearing challenging, among other things, the court of appeals' reliance on the *Charles River Bridge* decision. The court denied the petition, amending its opinion to state:

> The *Charles River Bridge* rule is simply another way of stating that "government contracts 'should be construed, if possible to avoid foreclosing exercise of sovereign authority.'" *Peterson* v. *Dept. of Interior*, [899 F.2d 799, ~~807~~ (9th Cir. 1990), petition for cert. pending No. 90-357] (quoting *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52 (1986)).

Pet. App. B1-B2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision in this case lacks national importance and continuing significance. The questions presented in this case, which involve the scope of a subsidy enjoyed by a limited number of geographically concentrated agricultural entities, turn on the proper interpretation of certain contracts, executed years ago, in light of unanticipated circumstances. Accordingly, further review is not warranted.

1. Petitioners assert (Pet. 14-22) that the court of appeals adopted an incorrect approach for ascertaining whether they have contractual rights to receive federal reclamation project water at the $8 per acre-foot rate for use on their excess lands. Specifically, petitioners contend that the court erred "by holding that inexplicit terms in commercial contracts or consent judgments against the government are automatically construed in favor of the government."

Pet. 14. Petitioners' characterization of the court's holding is inaccurate and, in any event, does not warrant further review.

Petitioners base their challenge on the court of appeals' quotation of a passage from this Court's *Charles River Bridge* decision stating that "[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public." 36 U.S. (11 Pet.) at 544. See Pet. App. A23. This Court, however, reviews judgments, not statements in opinions. See, *e.g.*, *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). In any event, the court of appeals indicated in its response to petitioners' petition for rehearing that the court was not holding that commercial contracts and consent judgments are "automatically construed in favor of the government." Pet. 14. The court explained that its reliance on *Charles River Bridge* was simply another way of stating that "government contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Pet. App. A23 n.18, B1-B2 (citing *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986)).

Petitioners are mistaken in suggesting that this principle does not apply to "commercial contracts." Pet. 15-16. Indeed, as this Court indicated in *POSSE*, the principle originated in disputes involving commercial contracts:

> While the Federal Government, as sovereign has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, * * * we have declined in the context of *commercial contracts* to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract.

> * * * Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs *all contracts* subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.

477 U.S. at 52 (emphasis added). In this case, the water service contracts contained "no explicit provisions" addressing the price of federal reclamation project water for excess lands that remained unsold after 10 years. Pet. App. A23-A24.[7] The court of appeals reasonably concluded, in accordance with *POSSE*, that the contracts did not foreclose Congress from enacting prospective legislation setting the price for such water to assure the future equitable distribution of the federal subsidy. *Ibid.*[8]

Petitioners ultimately contend that the court of appeals misinterpreted the particular contracts and consent judgment involved in this case. Pet. 17-22.

---

[7] As the court of appeals explained, the various contracts, at most, set a price for water that was delivered to the excess lands during the ten-year period when those lands were to be sold. Pet. App. A16-A23. The terms of the contracts "do[] not answer the question of what rights, if any, are given by the contracts to a landowner whose ten years has expired." *Id.* at A17.

[8] "From the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good." *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 292 (1958). Accordingly, courts should not lightly find an implied contractual surrender of Congress's power to adjust prospectively the distribution of benefits.

Petitioners' contentions are unpersuasive.[9] In any event, those contentions, which raise no important question of federal law and turn on the specific terms of the underlying documents and the unique circumstances of this case, plainly do not raise any issue that would warrant this Court's review. See *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, 110 S. Ct. 2034, 2042 (1990) (Rehnquist, C.J., concurring). And, since the judgment below independently rests on the court of appeals' resolution of these unique questions, the case is not an appropriate one for this Court's consideration of petitioners' additional contentions.

2. Even if the contracts could be construed as confering a right to the delivery of subsidized water for use on excess lands for the remaining terms of the extended recordable contracts, Section 224(h) would nonetheless pass constitutional scrutiny. Contrary to petitioners' assertions (Pet. 22-28), that statutory provision does not offend petitioners' Fifth Amendment rights nor does it violate the principle of separation of powers.

a. The Contract Clause of the United States Constitution does not apply to the actions of the federal government. *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717, 732, n.9 (1984). Rather, federal legislation affecting contracts is evaluated under the "less searching standards" of the

---

[9] For example, petitioners Boston Ranch and West Haven assert that "they supported the 1963 contract on the assumption they would 'pay no more than $8.00 per acre foot . . . through the date of sale' of their excess lands." Pet. 19. As we have noted, however, Paragraph 25(a)(i) of the 1963 contract expressly contemplated that excess landowners would dispose of their excess lands within ten years. Accordingly, petitioners could not have reasonably assumed that they would receive water at the $8 rate for more than ten years.

Due Process Clause of the Fifth Amendment. *Id.* at 733. Even if a contractual impairment has been established, the courts will weigh the competing interests and may hold that the public interest outweighs the private party's contractual interests. "As with laws impairing the obligations of private contracts, an impairment [of a government contract] may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977).

The nature of the asserted contract right and the extent of its impairment are relevant factors in the due process analysis. *POSSE*, 477 U.S. at 55; *United States Trust Co.*, 431 U.S. at 27. Another relevant concern is the degree to which the challenged legislation is "purely financial" in effect, rather than serving broader social purposes. *Id.* at 24-25. Applying these factors here, Section 224(h) clearly passes Due Process scrutiny.

First, petitioners' assertion that their contractual interests have been impaired is, at best, tenuous. Petitioners originally contracted for a right to receive federal reclamation project water to irrigate their excess lands for ten years only—the 1963 District Contract and the recordable contracts required disposition of that land at the end of the ten-year period. Nevertheless, by the time that Section 224(h) was enacted in December 1987, petitioners had received federal project water at the 1963 District Contract price of $8 per acre-foot for at least 13 years and as long as 17 years. Thus, petitioners have received the full benefit of their contractual bargain and an added measure as well.[10]

---

[10] Furthermore, petitioners had received other benefits from the enactment of the RRA. As originally executed, the re-

Petitioners' attenuated contractual interest must be weighed against Section 224(h)'s significant public purpose. As we have explained, the federal reclamation laws have sought to distribute the federal reclamation project benefits broadly. Indeed, the excess land limitations were designed to prevent an inequitable distribution of program benefits. As this Court observed in *Ivanhoe*:

> It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large holdings.

357 U.S. at 297. Petitioners have enjoyed the retention of excess lands and the receipt of a low-cost federally subsidized water service for a longer period than their contracts contemplated. Congress did not violate petitioners' due process rights by requiring that petitioners pay an equitable share of the government's future costs of providing that water.[11]

---

cordable contracts at issue obligated each petitioner to divest himself of all but 160 acres of his irrigable lands. Under the RRA, however, an excess landowner who is a qualified recipient and elects to come under the coverage of the discretionary provisions of the RRA is entitled to permanently retain 960 acres of his irrigable lands. Federal reclamation project water will be delivered to irrigate those lands at a charge sufficient to cover only the petitioners' share of the government's operations and maintenance costs. See Sections 204, 205(b), 208(b), 43 U.S.C. 390dd, 390ee(b), 390hh(b).

[11] "[I]t is hardly lack of due process for the Government to regulate that which it subsidizes." *Ivanhoe*, 357 U.S. at 295 (quoting *Wickard* v. *Filburn*, 317 U.S. 111, 131 (1942)). Moreover, Section 224(h) does not "take away property al-

b. Similarly, Section 224(h) does not effect a taking of petitioners' property interests within the meaning of the Just Compensation Clause. Not every governmental action that adversely affects property interests constitutes a taking; rather, the government may enact a wide variety of measures to promote the general welfare without incurring an obligation to pay compensation. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834-835 (1987). There is no fixed formula for ascertaining whether government action constitutes a taking; rather, that question must be determined based on an evaluation of the specific facts involved in each case. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-125 (1978). In making the determination, the courts will consider the nature and character of the governmental action in question and will weigh those factors against the economic impact of the regulation upon the claimant. *Ibid.*; *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 492 (1987).

In this instance, Congress's action falls short of a taking. The United States has a strong and continuing interest in supervising the reclamation program and insuring that its fundamental purposes are not frustrated by an inequitable distribution of the federal subsidy. Section 224(h) was enacted to further this interest. Petitioners cannot convincingly argue that Section 224(h) constitutes an undue imposition upon their reasonable "investment-backed expectations." *DeBenedictis* 480 U.S. at 485. As we have explained, both the District Contract and the record-

---

ready acquired * * * or deprive [petitioners] of the fruits actually reduced to possession of contracts lawfully made." *POSSE*, 477 U.S. at 55 (quoting *The Sinking-Fund Cases*, 99 U.S. 700, 720 (1878)).

able contracts expressly contemplated that excess landowners would have 10 years, and only 10 years, in which to divest themselves of their excess lands. Petitioners had no reasonable investment-backed expectation of owning the excess lands more than 10 years after executing the recordable contracts—much less a constitutionally protected right to receive low-cost water for use on those lands for some 18 years. Hence, Section 224(h) does not constitute a taking of any investment-backed expectations in violation of the Just Compensation Clause.[12]

c. Section 224(h) likewise does not present any substantial separation of powers questions. Petitioners assert that Congress, through Section 224(h), has impermissibly contravened the 1986 stipulated judgment. That judgment, however, does not address the specific issue presented here—namely, the price to be paid for water used to irrigate excess lands retained after the expiration of the 10-year contractual period provided for their disposition. Paragraph 4.1 of the 1986 judgment states that "the District and the United States shall perform the 1963 Contract" subject to certain provisos not relevant here. Pet. App. N2. The 1963 District Contract states that water shall be delivered to excess lands under recordable contracts for 10 years after such contracts are executed, but neither the 1963 District Contract nor the

---

[12] In addition, the Just Compensation Clause bars takings only where no avenue for obtaining just compensation is available. Even if we assume that Section 224(h) does effect a taking of contractual property interests, petitioners have an available and appropriate remedy for compensation under the Tucker Act, 28 U.S.C. 1491. Hence, Section 203(b) may not be set aside as an unconstitutional taking of private property. *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1020 (1984).

1986 judgment addresses any matters concerning continued water service beyond the 10-year period. Moreover, Paragraph 3 of the judgment states that it "shall not * * * confer on any party any right except as expressly provided herein." *Ibid.* Hence, petitioners' contention that Congress has impermissibly interfered with a federal court judgment is without foundation.

CONCLUSION

The petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

NOVEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE, 1990 282061 20185

REP
BRI

PLY
EF

Supreme Court, U.S.
FILED
NOV 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 90-409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EDSTON RANCH COMPANY,
EDWIN R. O'NEILL,
WEST HAVEN FARMING CO.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

Of Counsel:
HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
1. INTERPRETATION ISSUES	1
(a) *Interpretation Under Ordinary Canons of Construction*	2
(b) *Interpretation Under The Government's Special Canon of Construction*	4
2. CONSTITUTIONAL ISSUES	5
(a) *Standard Of Review*	5
(b) *Purpose Of The Statute*	5
(c) *Appropriate Remedy*	7

TABLE OF AUTHORITIES

Cases Page

American Stevedores v. Porello, 330 U.S. 446 (1946) 4
Barcellos & Wolfsen, Inc. v. Westlands Water District, 491 F. Supp. 263 (E.D. Cal. 1980) 8
Bowen v. Massachusetts, 487 U.S. 879 (1988) 8
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 4
Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837) 4
Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958) 5
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 4
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 7
United States v. Seckinger, 397 U.S. 203 (1970) 3
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 5

Statutes

2 United States Code
§ 632(a)(2) 6
§ 634(a)(2) 6
§ 639 6
§ 641(a)(2) 6
§ 641(d)(2) 6

28 United States Code
§ 1491 7

43 United States Code
§ 390uu 7
§ 423e 5

Regulations

43 Code of Federal Regulations
§ 426.11(i)(4) 3

Congressional Record

133 Congressional Record
E4995 (daily ed. Dec. 22, 1987) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-409

BOSTON RANCH COMPANY,
EDWIN R. O'NEILL,
WEST HAVEN FARMING CO.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

Petitioners hereby reply to arguments first raised in the government's brief in opposition to certiorari.

1. INTERPRETATION ISSUES

The government offers several arguments about why it thinks that petitioners' contentions that the majority Opinion misinterpreted the contracts and consent judgment are unpersuasive.

(a) *Interpretation Under Ordinary Canons of Construction*

The government suggests (at 22) that petitioners' contracts "expressly" provide that they would enjoy their rights for only ten years. But it cites no clause so providing, and none exists. Indeed, the government's suggestion conflicts with the finding of the majority Opinion (A23-24) that the contracts are not "explicit" on the point and, therefore, need to be construed.

Petitioners do not here challenge the finding that the contracts and the judgment at bar are not explicit. Instead, petitioners ask the Court to determine what principles of contract interpretation govern an inexplicit commercial contract with, or judgment against, the government. Must a federal court apply the ordinary canons of interpretation? Or may it rely exclusively on the canon that an inexplicit federal obligation will be automatically construed in favor of the government? This question is not unique to this case. It governs every inexplicit contract and consent judgment to which the government is a party.

The government's brief does not contest petitioners' arguments that federal contracts and consent decrees are governed by the ordinary canons of interpretation. (See Pet. at 16-22.) Indeed, its own analysis of the intention of the parties highlights the Ninth Circuit's erroneous failure to consider such factors:

(1) The government (at 18 n. 9) does not dispute that petitioners submitted uncontested testimony in the trial court that they supported the 1963 contract based on the "assumption" that they would pay no more than $8.00 per acre foot for water until they sold their excess lands. However, the government argues that petitioners could not have "reasonably" so assumed. The government presented no evidence in the trial court showing that petitioners' assumption was unreasonable. Its contention of unreasonableness is made here for the first time. Furthermore, petitioners' assumption was reasonable in 1963.

Article 25(b)(i) of the 1963 contract itself contemplated that excess lands might not be sold in ten years.

(2) The government asserts (at 22) that petitioners "had no reasonable . . . expectation of owning their excess lands more than 10 years after executing the recordble contracts." Petitioners disagree. Rule 11(i)(4), which provided that land under extended recordable contract held by a prior law recipient may continue to buy water "at the contract rate for the extended term of the contract," confirmed petitioners' reasonable expectations. 43 CFR § 426.11(i)(4) (1983). The majority Opinion (A24) found as follows: ". . . [w]e do not . . . imply that they lacked any reasonable expectation to receive the water for the extended period of their recordable contracts. Interior's December 1983 regulations created reasonable expectations that the landowners would be able to receive subsidized water for the extended period." Thus, the government's assertion here directly contradicts the finding of the Ninth Circuit.

(3) The government appears to argue (at 21-22) that the reasonable expectations of petitioners to pay the contract rate were not "investment-backed." As a result of agreeing to the 1986 stipulated judgment petitioners and their neighbors released claims and assumed obligations worth millions of dollars. Petitioners presented uncontested testimony in the trial court that they did so in "reliance" upon the fact that they would continue to be able to buy water at the contract rate until their excess lands were sold. Certainly, their reasonable expectations to pay that rate in the future were investment-backed.

The government's own focus on whether petitioner's assumptions and expectations were reasonable and on whether petitioners took detrimental actions in reliance thereon suggests that the intent of the parties must be ascertained in one of two ways. This Court may find that the parties intended and the contracts and judgment mean that the contract rate will be honored until excess

lands are sold. See *United States v. Seckinger*, 397 U.S. 203, 208-16 (1970) (reversed on finding intention of the parties based on appellate record). Alternatively, if further evidence needs to be taken to support these contentions, the matter would warrant a remand to the district court for such purposes. See *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 457-58 (1946) (reversed and remanded to determine intention of the parties and meaning of the contract).

(b) *Interpretation Under The Government's Special Canon of Construction*

The government argues (at 16-17) that the special canon of construction announced in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 544 (1837) and in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52-53 (1986), applies to commercial contracts of the government. The only support it offers for this proposition is the following quotation from *Bowen*:

> ". . . [W]e have declined in the context of commercial contracts to find that a 'sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in' the contract. . . . Rather, we have emphasized that '[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' *Ibid.*" 477 U.S. at 52.

Bowen, itself, did not involve a commercial contract. Therefore, the *Bowen* language was *dicta*. Furthermore, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), the case from which the language was taken, is distinguishable from the case at bar. In that case, an Indian tribe imposed a severance tax on oil and gas removed from tribal lands. Persons who extracted oil and gas under leases with the tribe unsuccessfully challenged the tax under applicable statutes and treaties, governing

principles of Indian sovereignty, and the Commerce Clause of the U.S. Constitution. As *Jicarilla* did not not involve a contract with or a judgment against the federal government, it did not, as here, raise issues under the Fifth Amendment or separation of powers provisions.

2. CONSTITUTIONAL ISSUES

The government offers several arguments as to why it contends that, even if the contracts and judgment entitled petitioners to the contract rate for 18 years, Section 224(h) passes constitutional muster.

(a) *Standard Of Review*

The government appears to concede (at 19) that Section 224(h) must withstand elevated and careful judicial scrutiny, as it quotes *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977) for the proposition that a law impairing a government obligation will be constitutional only if it is ". . . necessary to serve an important public purpose." The Ninth Circuit, instead (A16, A24), adopted the rational basis test. Its failure to exercise careful scrutiny, in itself, is a sufficient reason to grant review.

(b) *Purpose Of The Statute*

The government, however, misstates what the purpose of Section 224(h) is. Both sides agree about the purpose of the excess land laws, especially Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e. (See Pet. at 4; Opp. at 17 n. 8, 20.) The purpose of Section 46 was to distribute the reclamation benefits, that is, the interest subsidy, to "the largest number of people" or "the greatest number of individuals." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 292, 297 (1958). But at issue in this case is the purpose of Section 224(h), which retroactively increased the water rate of certain excess landowners, not Section 46, which prospectively required all excess landowners to agree to sell their lands.

As a preliminary matter, the government asserts (at 17) that the "court of appeals reasonably concluded" that the purpose of Section 224(h) was "to assure the future equitable distribution of the federal subsidy." For this proposition, the government cites the majority Opinion (A23-A24). But, in fact, the Opinion reached no such conclusion at those pages, or elsewhere.

The government also directly argues (at 21) that the purpose behind Section 224(h) was the same purpose as that behind Section 46, as follows: "The United States has a strong and continuing interest in supervising the reclamation program and insuring that its fundamental purposes are not frustrated by an inequitable distribution of the federal subsidy. Section 224(h) was enacted to further this interest." This argument is incorrect. The purpose of Section 224(h) was not to alter the distribution of the interest subsidy by spreading it to more participants, but rather to reduce the amount of the interest subsidy by extracting more federal revenue from certain farmers.

There is no legislative history nor evidence in the record suggesting that the purpose of Section 224(h) was to distribute the benefits of the interest subsidy to more irrigators. As four factors definitively demonstrate, this was a revenue-raising measure, pure and simple.

First, Section 224(h) was enacted as part of a budget reconciliation measure which covers, among other things, "revenue increases." 2 U.S.C. §§ 632(a)(2), 634(a)(2), 639, 641(a)(2), 641(d)(2).

Second, the sponsor of the statute admitted that its purpose was fiscal. Representative Miller told his colleagues that his bill will have the effect of "saving taxpayers tens of millions of dollars." 133 Cong. Rec. E4995 (daily ed. Dec. 22, 1987).

Third, the government's brief in the trial court conceded that Section 224(h) was a revenue-raising measure.

It said: "Section 224(h) was adopted for the specific purpose of relieving the American taxpayer of providing continuing subsidies to the plaintiffs."

Fourth, the sole effect of Section 224(h) has been to raise federal revenues by millions of dollars. It has in no way altered the distribution of program benefits. Nor did it cause excess landowners to sell prematurely. Boston Ranch did not sell its lands until just before its recordable contract so required. West Haven continues still to hold its lands. The only result of the challenged statute is that the government is richer and petitioners are poorer.

(c) *Appropriate Remedy*

The government argues (at 22 n. 12) that, even if Section 224(h) effects a taking of their rights, petitioners have an "available and appropriate remedy for compensation" under the Tucker Act, 28 U.S.C. § 1491, and, hence, Section 224(h) "may not be set aside as an unconstitutional taking" of those rights under *Ruckleshaus v. Monsanto Co.*, 476 U.S. 986, 1016-20 (1984).

The court in *Monsanto* declined to infer a withdrawal of a Tucker Act remedy from a vague provision, the structure of the statute, or its legislative history. Here, by contrast, Section 221 of the Reclamation Reform Act of 1982 provides an express remedy in the district court. 43 U.S.C. § 390uu. Section 221 reads as follows:

> "Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like cir-

> cumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated."

In the litigation underlying the proceedings giving rise to the instant petition, the court held that a less precise statute gave it jurisdiction to adjudicate all rights relating to water. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263, 266-67 (E.D. Cal. 1980). The jurisdiction of the Claims Court is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." *Bowen v. Massachusetts*, 487 U.S. 879; 108 S. Ct. 2722, 2740 n. 48 (1988).

Monsanto is further distinguishable from the case at bar. Here, petitioners brought a motion to enforce the judgment in the court which had rendered the judgment in accordance with the terms of the judgment. (See N1-N2.) The disputed surcharges imposed to date have been interpled with the district court pending resolution of this case. Relief is also sought as to future surcharges. At issue here is the validity of the statute imposing the surcharges, as applied to petitioners, under the separation of powers doctrine and the due process clause of the Fifth Amendment. Under such circumstances, the district court had jurisdiction to declare that Section 224(h) comprises an invalid abrogation of petitioners' rights.

Respectfully submitted,

Of Counsel:
HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioners

Dated: November 14, 1990